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U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

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PUBLIC COPY

[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: JAN 09 2007

EAC 05 207 53895

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Mari Johnson

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as an alien of exceptional ability or a member of the professions holding an advanced degree. The petitioner seeks employment as a transport engineer. The petitioner asserts that an exemption from the requirement of a job offer, and thus of an alien employment certification, is in the national interest of the United States. The director found that the petitioner did not qualify as an advanced degree professional and did not conclusively determine whether the petitioner qualifies for classification as an alien of exceptional ability. The director ultimately concluded that the petitioner had not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits a personal statement discussing Citizenship and Immigration Service's (CIS) failure to issue work authorization to the petitioner while his Form I-485, Application to Register Permanent Residence or Adjust Status, was pending. The petitioner's discussion fails to overcome the director's bases for denial.

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer.
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirement of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree *followed by* at least five years of

progressive experience in the specialty shall be considered the equivalent of a master's degree." *Id.* (Emphasis added.)

The petitioner holds a Bachelor of Engineering from the Georgian Technical University. The petitioner completed the coursework for this degree "in the year 2002" and received his degree on February 10, 2003. The petitioner worked as an engineer-technologist at the Georgian company Plastic for five years, from November 1998 to November 2003. The record contains no evidence of employment after November 2003. Thus, the petitioner does not have five years of experience *following* his bachelor's degree. The director concluded that the petitioner is not an advanced degree professional. The petitioner does not address this issue on appeal. As the petitioner does not have five years of post-baccalaureate experience, we concur with the director.

The director concluded that because the petitioner does not possess an advanced degree or the regulatory equivalent, he must be seeking classification as an alien of exceptional ability. The director, however, while listing the regulatory criteria for that classification, did not reach a final conclusion on this issue. As the petitioner has not overcome the director's basis for denial for the reasons discussed below, we will also examine whether the petitioner has established eligibility as an alien of exceptional ability. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

The regulation at 8 C.F.R. § 204.5(k)(3)(ii) sets forth six criteria, at least three of which an alien must meet in order to qualify as an alien of exceptional ability in the sciences, the arts, or business. These criteria follow below.

The regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered." Therefore, evidence submitted to establish exceptional ability must somehow place the alien above others in the field in order to fulfill the criteria below; qualifications possessed by every member of a given field cannot demonstrate "a degree of expertise significantly above that ordinarily encountered." The criteria follow.

> *An official academic record showing that the alien has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability*

As stated above, the petitioner has a Bachelor of Engineering degree. Section 203(b)(2)(C) of the Act provides that the possession of a degree, diploma, certificate or similar award from a college, university school or other institution of learning shall not by itself be considered sufficient evidence of exceptional ability. Thus, we must determine whether the petitioner's degree is indicative of or consistent with a degree of expertise significantly above that ordinarily encountered. The record

lacks evidence that a bachelor's degree is unusual in the petitioner's field of engineering. Thus, the petitioner has not established that he meets this criterion.

Evidence in the form of letter(s) from current or former employer(s) showing that the alien has at least ten years of full-time experience in the occupation for which he or she is being sought

As stated above, the petitioner has documented only five years of experience. Thus, he has not established that he meets this criterion.

A license to practice the profession or certification for a particular profession or occupation

The record contains no evidence relating to this criterion.

Evidence that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability

The petitioner submitted evidence that from November 1998 through November 2003 he earned 300 GEL per month. The record contains no evidence that this wage is indicative of a degree of expertise significantly above that ordinarily encountered. Specifically, the record lacks evidence of typical engineering wages in Georgia.

Evidence of membership in professional associations

The petitioner submitted a June 7, 2005 letter from the Georgian Association of Young Engineers asserting that he "is" the Vice Chairman of the association since the date of the organization's founding. The petitioner submitted the registration of this association listing him as a member of the Board of Directors. The record contains no evidence regarding the reputation or significance of this association. Thus, the petitioner has not established that his role with this association is indicative of a degree of expertise above that ordinarily encountered.

Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations

The petitioner submitted reference letters attesting to his character and academic work. The petitioner, however, failed to submit evidence of the type of formal recognition for achievements contemplated by this criterion. Thus, the petitioner has not established that he meets this criterion.

As the petitioner has not demonstrated that he is an alien of exceptional ability, the issue of whether waiving the job offer requirement is in the national interest is moot. Nevertheless, we will address this issue as it was the sole basis of the director's decision.

Neither the statute nor pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to the regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dep't. of Transp., 22 I&N Dec. 215 (Comm. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on *prospective* national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

The director listed the factors for consideration, noted that the petitioner was unemployed and concluded that the record lacked relevant evidence suggesting that a waiver of the alien employment certification might be in the national interest. On appeal, the petitioner asserts that he applied for work authorization but did not receive it and had to turn down employment opportunities. The petitioner submits additional reference letters and a job offer.

While we concur with the director's ultimate decision, more discussion is warranted. First, the petitioner works in an area of intrinsic merit, engineering. Next, we must consider whether the proposed benefits of his work would be national in scope. The petitioner did not initially assert what the proposed benefits of his work would be. He indicated on Part 6 of the petition that he proposed to perform a wide range of engineering duties, such as the installation, maintenance, repair, upgrade,

and invention of machines and mechanisms. He also listed these as his duties for Plastic in Georgia. The initial letter from [redacted] Chairman of the Board for Plastic, confirms only that the petitioner was employed there as an engineer-technologist. The remaining letters submitted initially affirm the petitioner's academic success and personal character.

On appeal, Mr. [redacted] praises the petitioner's professionalism while working for Plastic and asserts that the company was able to reach an "agreement" with Coca Cola, but fails to identify any specific accomplishment by the petitioner while at Plastic. [redacted] President of [redacted] Inc., expresses an interest in hiring the petitioner as a mechanical engineer to help "upgrade vehicles with a new patented technology."

The following footnote in *Matter of New York State Dep't of Transp.*, 22 I&N Dec. at 217 is relevant to our analysis.

> For instance, pro bono legal services as a whole serve the national interest, but the impact of an individual attorney working pro bono would be so attenuated at the national level as to be negligible. Similarly, while education is in the national interest, the impact of a single schoolteacher in one elementary school would not be in the national interest for purposes of waiving the job offer requirement of section 203(b)(2)(B) of the Act. As another example, while nutrition has obvious intrinsic value, the work of one cook in one restaurant could not be considered sufficiently in the national interest for purposes of this provision of the Act.

Id. at 217, n.3

The record lacks evidence that the petitioner is an inventor or engineering researcher. Rather, the proposed duties appear to involve performing engineering duties based on the innovations of others. The petitioner has not explained how upgrading vehicles for a single company based on technology patented by others would provide more than an attenuated impact at the national level. Thus, we cannot conclude that the proposed benefits of the petitioner's work would be national in scope.

It remains, then, to determine whether the petitioner will benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications. Eligibility for the waiver must rest with the alien's own qualifications rather than with the position sought. In other words, we generally do not accept the argument that a given project is so important that any alien qualified to work on this project must also qualify for a national interest waiver. At issue is whether this petitioner's contributions in the field are of such unusual significance that the petitioner merits the special benefit of a national interest waiver, over and above the visa classification he seeks. By seeking an extra benefit, the petitioner assumes an extra burden of proof. A petitioner must demonstrate a past history of achievement with some degree of influence on the field as a whole. *Id.* at 219, n. 6.

While the petitioner may have been unable to work in the United States due to his lack of work authorization, it remains that he had been unemployed for nearly two years as of the date of filing the petition. The petitioner must already have an established track record *as of the date of filing* the petition. *See* 8 C.F.R. § 103.2(b)(12); *Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg. Comm. 1971). Thus, even if the petitioner had obtained work authorization based on his concurrently filed visa petition and adjustment application, he would not be able to demonstrate eligibility for the visa classification sought based on work performed after the concurrent filing. Regardless of why the petitioner was unable to work in the United States, he has not established that his achievements in Georgia warrant a waiver of the alien employment certification in the national interest. Specifically, while the record contains letters praising the petitioner's professionalism and character, the letters fail to identify specific achievements or explain how the petitioner is responsible for creative innovations that have influenced the field of engineering. A U.S. employer could list the petitioner's education and experience on an application for alien employment certification. Nothing in the legislative history suggests that the national interest waiver was intended simply as a means for employers (or self-petitioning aliens) to avoid the inconvenience of the alien employment certification process. *Id.* at 223.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved alien employment certification will be in the national interest of the United States.

For the above stated reasons, considered both in sum and as separate grounds for denial, the petition may not be approved. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

This denial is without prejudice to the filing of a new petition by a United States employer accompanied by an alien employment certification certified by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.